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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 591

TURLOCK IRRIGATION DISTRICT, CALIFORNIA AND MODESTO IRRIGATION DISTRICT, CALIFORNIA, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Brief of the States of Kentucky, Nebraska, New York, North Dakota, South Dakota and Wyoming as Amici Curiae in Support of Petition for Writ of Certiorari

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Amici Curiae Brief in Support of Petition For Writ of Certiorari

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The States of Kentucky, Nebraska, New York, North Dakota, South Dakota, and Wyoming through their Attorneys General, respectfully submit this joint brief as amici curiae under Rule 42(4) in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Turlock and Modesto Irrigation Districts, public agencies of the State of California.

REASONS FOR GRANTING THE WRIT

1. The case presents questions of substantial importance affecting the jurisdiction of the States over the determination of consumptive use rights on streams within their boundaries.

The States have traditionally exercised jurisdiction over the determination of relative rights to the beneficial consumptive use of the waters within their boundaries. In the non-public land Eastern States, this power emanated from those held by the original colonies upon adoption of the Constitution. In the public land States of the West, similar jurisdiction in the States was confirmed by Congress in the Acts of 1866,[1] 1870[2] and 1877,[3] which this Court has construed [4] as providing that water rights were to be acquired in the manner provided by the law of the State of location.[5] Thus, until this case the security of title and right to water use has depended solely upon State law.

Pursuant to this, the States have over the years established administrative and judicial procedures for the establishment of irrigation, municipal and other use rights to these waters as between all users,

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[1] Rev. Stat. § 2339 (1875), 30 U.S.C. § 51 (1958).

[2] Rev. Stat. § 2340 (1875), 30 U.S.C. § 52 (1958).

[3] 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321.

[4] *Jennison* v. *Kirk*, 98 U.S. 453 (1879); *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935); see *Nebraska* v. *Wyoming*, 325 U.S. 589, 611-616 (1945); *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 448 (1955).

[5] Congress has reiterated this policy in some 35 different statutes. See collection in *Hearings Before The Subcommittee On Irrigation And Reclamation Of The Senate Committee on Interior and Insular Affairs On S. 1275*, 88th Cong., 2d Sess. 302-10 (1964).

including the United States.[6] The State proceedings expressly adjudicate the relative rights to the use of water between respective irrigation and municipal uses and all other conflicting uses, including uses for fish. Millions of dollars are invested in water projects in reliance upon these State determinations of proprietary rights.

The decision of the Ninth Circuit shakes this entire foundation. It rejects a water right determination made by California in 1953 and approves an FPC license which will impair irrigation water rights held under permit, license, and appropriation, some of which are over a hundred years old. The court held "... [T]he [Federal Power] Commission has the legal authority to take appropriate action restricting the use of such irrigation rights ..." (345 F. 2d at 924). Thus, in any situation where a license is required, the court holds the Federal Power Commission may take irrigation and municipal use rights vested under State law and reallocate those waters to other users regardless of any conflicting State determination. Under such a holding, State granted water rights are completely negated.

This newly found jurisdiction in the Federal Power Commission over irrigation and municipal rights is not limited to instances of irrigation versus fish. The holding below would equally clearly empower the Commission to reallocate uses on a river between classes of irrigation users, or between irrigation and municipal users or other users. For instance, the Commission could decide that the "best comprehensive develop-

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[6] See *Nebraska* v. *Wyoming*, 325 U.S. 589, 611-616 (1945); *United States* v. *Fallbrook Public Utility District*, 347 F. 2d 48, 55 (9th Cir. 1965).

ment of a waterway" would be to require farmers to yield up their irrigation water to industrial use, regardless of how long established and how prior the irrigation rights were under State law.

Thus, the decision below would, for the first time, we believe, permit the Federal Power Commission to duplicate and supersede State decisional processes for the determination of relative consumptive use rights, This is an important question affecting the traditional jurisdiction of the States which should be considered by this Court.

2. The decision below is clearly wrong

The decision below fails even to refer to this Court's leading decision of *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n.*, 328 U.S. 152, 175-177 (1946), which rules that Congress in enacting Section 27 of the Federal Power Act intended to protect or "save" state laws "as to the control, appropriation use or distribution of water in irrigation or for municipal or other uses of the same nature" from supersedure by the act. This Court concluded:

> This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the states, Congress is willing to let supersedure of the state laws by federal legislation take its natural course. (328 U.S. at 176).

Furthermore, the court below made no reference to the clear unambiguous legislative history of Section 10(a) of the Act, showing that Congress twice eliminated language which might have been deemed to give the Federal Power Commission control over consump-

tive use water rights on issuing a license.[7] The elimination of the word "irrigation" from Section 10(a), as the debate makes clear, was for the express purpose of reserving the control and determination of consumptive use rights to the States, as set forth in Section 27 of the Act. Thus, there is no conflict between Sections 10(a) and 27 of the Act as the court below hypothecated—both are consistent in their recognition that the States, not the Federal Power Commission, are to have the final jurisdiction over irrigation and municipal consumptive uses of water.

Up to the present time, the Federal Power Commission has never claimed authority to control these uses.[8] To the contrary, the Commission in a long line of cases has consistently recognized that it can do nothing in licensing a project that would impair irrigation and municipal use rights acquired under State law.[9] This

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[7] 58 Cong. Rec. 2134-35 (1919). 56 Cong. Rec. 9114-15, 9901-03 (1918).

[8] Even in the present case, the Federal Power Commission declined to decide whether it could invade irrigation and municipal use rights vested under State law, although the court below so held after deciding that the issue must be reached because the Commission's order had such an effect.

[9] *East Bay Municipal Utility District*, 1 F.P.C. 12, 13 (1932); *Southern California Edison Co.*, 8 F.P.C. 364, 384-85 (1949); *Fresno Irrigation District, et al.*, 8 F.P.C. 348, 355, 357 (1949); *Oakdale Irrigation District, et al.*, 10 F.P.C. 810, 811 (1951); *California Oregon Power Co.*, 13 F.P.C. 1, 5, 8, 9 (1954). See also *California Oregon Power Co.*, 23 F.P.C. 59, 65, 18 F.P.C. 364, 368 (1957) amending 15 F.P.C. 14, 15, 22 (1956); *Montana Power Co.*, 15 F.P.C. 1330, 1337 (1956) (Article 31); *Public Utility District No. 1 of Okanogan County, Washington*, 15 F.P.C. 1602, 1604 (1956) (Article 25); *California Oregon Power Co.*, 13 F.P.C. 1, 8-9 (1954); *Portland General Electric Co.*, 10 F.P.C. 445, 458-459 (1951) (Article 28); *Fresno Irrigation District, et al.*, 10 F.P.C. 460, 464-465 (1951); *Montana Power Co.*, 10 F.P.C. 884 (1951); *Oakdale Irrigation District, et al.*, 10 F.P.C. 1278, 1281 (1951) (Article 29); *Niagara Falls Power Co.*, 9 F.P.C. 228, 254 (1950); *Great Northern Power Co.*, 1 F.P.C. 124 (1933).

well established administrative construction, which recognizes final authority in the States over consumptive uses, is alone consistent with the integration of State and Federal jurisdictions over water resources development established by Congress in the Federal Water Power Act and recognized by this Court in *First Iowa.*

CONCLUSION

The decision of the court below authorizing the Federal Power Commission for the first time in issuing power licenses to duplicate and supersede the States' jurisdiction over consumptive uses of water is clearly wrong as a matter of law. The Federal Power Commission should properly only be granted such broad new powers by express action of the Congress, not by judicial decision that runs counter to the declared purpose of the Act and forty-five years of established Federal-State relations thereunder. With the ever increasing importance of consumptive uses of our streams, this Court should review the decision to determine whether Congress in 1920 intended to establish the Federal Power Commission as the supreme arbiter of irrigation and municipal uses or to leave this jurisdiction to the States.

Respectfully submitted,

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